A NOTE ON MOTION PRACTICE
IN THE UNITED STATES BANKRUPTCY COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

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I. INTRODUCTION

During these past three years I have had the privilege of serving as Chief Bankruptcy Judge for this District. During this time, I have had an opportunity to work with many fine lawyers who work diligently to represent the interests of their clients with the high degree of professionalism and collegiality which is typical of the lawyers who appear in this Court. In these past three years this Court has undergone a tremendous amount of change. First, both judges have changed. My colleague, Dwight Williams, and I have succeeded Judge Gordon and Judge Steele, two outstanding judges who served this Court for many years. This turnover has resulted in inevitable differences in preferences and style. Second, the case load has increased tremendously, from 5,500 filings per year in 1999 to more than 9,000 cases which I anticipate will be filed this year. Third, we have changed to the new CM/ECF (Case Management/Electronic Case Filing) system which permits the electronic filing of documents with the Court and electronic case management. We are rapidly moving to an electronic environment, which will involve fundamental changes in both the way that the public interacts with the Court and the way the Court does its business. As these changes will have a considerable impact upon the practice of law in this Court, I think this is a good time to begin a dialog with the bar to discuss the impact of these

changes on the way law is actually practiced on a day to day basis. I would very much like to hear from the bar as to their thoughts on how the practice of law may be improved. I sincerely invite the advice and counsel of the many outstanding lawyers who practice in this Court.

There are three fundamental principles of good motion practice which I would like to emphasize in this note. First, counsel should make themselves thoroughly familiar with the Bankruptcy Code and Rules so that: (a) unnecessary motions are not filed; and (b) those motions which are filed are well grounded in the law. Second, when the filing of a motion is appropriate, it should "state with particularity the grounds therefor, and shall set forth the relief or order sought." FED. R. BANKR. P. 9013. It is not appropriate to file generic or "boiler plate" motions which fail to allege specific facts that demonstrate the basis for relief. Third, by the time a motion is called for hearing, the Court expects that counsel have communicated with each other and have attempted in good faith to settle the matter. If counsel cannot in good conscience settle a matter, they should cooperate with one another, taking extraneous matters out of dispute, and streamlining the presentation of evidence. With these goals in mind, I offer the following.

II. UNNECESSARY MOTIONS

A. MOTIONS TO AMEND SCHEDULES AND STATEMENTS

Over many years, the practice in this Court has evolved in some ways which have become inefficient from both the Court's and counsel's point of view. I believe our first priority should be to eliminate the many unnecessary motions which are filed in this Court. The most common of this type of motion is a motion to amend the Schedules or the Statement of Financial Affairs. The motion is unnecessary as the Bankruptcy Rules permit the debtor to amend, without leave of court, at any time prior to the closing of the case. FED. R. BANKR. P. 1009. If for any reason it becomes necessary to amend the schedules or statements, simply file an amended schedule, observing all applicable rules. Aside from filing unnecessary motions, the most common mistakes in this area are: (1) not using the prescribed form; (2) failing to serve affected parties; and (3) failing to sign and verify the amended schedule properly. See FED. R. BANKR. P. 1008, 1009.

B. PRECONFIRMATION MOTIONS TO AMEND PLANS

The second most common type of unnecessary motion is a motion to amend Chapter 13 Plans prior to confirmation. It is not necessary to file a motion to amend a Chapter 13 Plan prior to confirmation. 11 U.S.C. § 1323. Simply file the amended plan and serve copies upon all parties in interest. Please remember to attach a certificate of service and date the plan so that it is clear which is the most current plan. It is a good practice to highlight, underline or use the "bold" key on the word processor to indicate changes so that the Court, the Trustee and any interested parties may quickly

determine how the amended plan differs from the original plan. I would like to caution counsel against making a related mistake, which is the failure to file a motion to modify a plan, after confirmation. 11 U.S.C. § 1329; FED. R. BANKR. P. 3015(g).

C. MOTIONS TO AVOID GARNISHMENTS

A third type of unnecessary motion is one to release garnishments or otherwise give effect to the automatic stay. Such motions are unnecessary because the automatic stay is effective by operation of law and does not require an order of the Court to become effective. I addressed this problem in a case styled, *In re Briskey*, 258 B.R. 473 (Bankr. M.D. Ala. 2001). Upon receipt of information that a bankruptcy case has been filed, creditors should take all necessary actions to release garnishments, attachments, writs of execution and the like. Inadvertent violations of the automatic stay should be remedied promptly. Most debtors who file bankruptcy have one or more creditors who are in the process of taking collection action of some kind, be it a mortgage foreclosure, vehicle repossession, wage garnishment or any one of a number of other collection actions. In the vast majority of cases, counsel acting in good faith should be able to resolve these issues without the intervention of the Court. Counsel should not resort to filing an adversary proceeding or contested matter unless less formal means of dispute resolution first have been attempted. Creditors who refuse to cooperate, insisting upon an order tailor made to their situation, may find themselves subject to sanctions. Counsel who represent creditors should note that it may be necessary to take affirmative steps so as not to violate the automatic stay. For example, they may not properly take the position that a writ of garnishment, which was properly served and attached upon the debtor's wages, need not be released. This problem was

discussed in Briskey. I have provided a copy of the opinion in Briskey for additional guidance in these circumstances.

D. MOTIONS TO APPROVE REAFFIRMATION AGREEMENTS

A fourth type of unnecessary motion is a motion to approve a reaffirmation agreement. If the debtor is represented by counsel who is willing to execute the necessary affidavit, simply file the reaffirmation agreement with the necessary certification. See 11 U.S.C. § 524(c). A debtor need not seek the Court's approval for reaffirmation agreements unless the debtor is pro se or represented by a lawyer who is unwilling to make the required certification. In the future, the Court may deny these motions without notice or hearing.

E. THE EFFECT OF UNNECESSARY MOTIONS UPON THE COURT

These unnecessary motions cause the Court several problems which could be alleviated if counsel refrained from filing such motions. Under the new CM/ECF system, each motion filed is treated as a pending motion until some disposition is made by the Court. If the Court simply ignores such motions, as we have admittedly done in the past, these motions will show up on a "pending motion" report. In an electronic (paperless) environment, we use the pending motion report to make sure that all motions receive prompt attention. I no longer have a stack of "hard copy" motions piling up in my in box to let me know that I have work to do. Rather, I have a pending motion report instead. If the pending motion report is clogged with hundreds of pending motions, the report loses its value to the Court and makes it more likely that a substantive motion (one which requires the Court's attention)

may be overlooked. If counsel would review the pertinent Bankruptcy Rules and their own practices, they will be spared the administrative burden of filing a motion which does not in any way advance their client's interest. In addition, the Court will be spared the burden of disposing of thousands` of such motions. For example, if two unnecessary motions per case were eliminated, over the course of a year, the Court would be saved the expense of the rendition, entry, and service of 18,000 orders, and at least 36,000 docket entries.

III. MOTIONS FOR RELIEF FROM THE AUTOMATIC STAY (11 U.S.C. § 362(d))

A. PLEADING

Motions for relief from the automatic stay are the most frequently litigated contested matters on this Court's docket. In Chapter 7 cases, when such a motion is filed, it is the practice of this Court to enter a "negative notice" order, which provides that the automatic stay will terminate, without further notice or hearing, unless a response is filed by another party within a given period of time. As most of these motions in Chapter 7 cases are not opposed, we have found that this is an efficient way to handle this problem. Our current practice is to set for hearing all motions for relief from the automatic stay which are filed in cases under Chapters 11, 12 and 13. It has been the Court's experience that Chapter 13 Debtors frequently file responses to the negative notice orders, making necessary a hearing. Thus the use of a negative notice order actually created more work for the Court and resulted in additional delay for the litigants than if the matter had simply been set for hearing at the outset.

Motions for relief from the automatic stay in Chapter 13 cases are most frequently grounded on a post-petition default in monetary payments. Frequently, these motions contain a general statement to the effect that "the debtor is in default," or "the debtor is greatly in default," without setting forth the precise amount of the default. Such motions, by their lack of specificity, invite an equally vague general denial. Such pleadings are not much help to the Court. A well pleaded motion should contain a specific representation as to precisely what amount is in default. I will illustrate with a hypothetical situation: Assume that Joe Debtor filed bankruptcy on January 15, 2002. His mortgage payments, in the amount of $500 per month, are due on the first of each month. Assume further that the XYZ Bank, who holds the mortgage on Joe's home, files a motion for relief from the automatic stay alleging as a basis Joe's post-petition default in payments. Assume further that XYZ files its motion on August 15, 2002, when a total of 7 payments have become due since the date of the petition. (Feb. 1–Aug. 1). If Joe made only two monthly payments, on March 1 and May 15, he is 5 payments in arrears, for a total post-petition default of $2,500, plus other additions. If Joe disputes XYZ's allegations, his counsel should mail the Bank's lawyer copies of documents indicating that 7 payments have been made. The Court expects that counsel will exchange documents informally.

Ordinarily, it should not be necessary to file proof of payment with the Court, unless counsel are unable to resolve their dispute informally. While a post-petition default in monetary payments will be the most frequent cause for the filing of a motion of this kind, the Court expects that, by their nature, they will be litigated infrequently as counsel should be able to resolve these without the Court's assistance. In those instances in which the moving party has been shown to have incorrectly alleged the existence of a monetary default, it is expected that the motion will be promptly withdrawn. On the

other hand, if the debtor cannot produce proof of payment, it is expected that he will withdraw any defense raised which asserts that he has.

The Court expects that counsel who represent debtors will instruct them to keep proof of payment of all payments made under any Chapter 13 plan, whether payment is made to the Trustee or directly to a secured party. Too often, debtors and their counsel will appear at a hearing pleading for time to search for proof of payment. In some cases this is the result of poor record keeping by a debtor, while in others it is a willful misrepresentation to the Court and the secured party in an effort to buy additional time. In the past I have frequently erred on the side of caution, continuing hearings to provide debtors time to obtain proof of payment even when I had doubts as to the veracity of their claim. In the future, I will be less inclined to accept a mere claim payment without supporting documentation.

B. HEARINGS

When motions for relief from the automatic stay are set for hearing, counsel should confer in advance to see if the matter can be resolved informally. The Court expects that counsel will communicate with each other and resolve the majority of these motions. When there are disputed facts, it is expected that counsel will informally exchange documents and information, without the necessity of formal discovery.

If counsel are unable to settle a matter, and a motion for relief from the automatic stay is called for hearing, counsel should confer and, insofar as is possible, stipulate to facts which are not in dispute.

Most motions for relief from the automatic stay which are actually tried, are done so on stipulated facts with counsel making legal arguments. Stipulations of fact may be done orally or in writing. If there are disputed facts, and if the evidence may be heard in 15 minutes or less, the Court may hear evidence and decide the case on the first setting. Counsel should not appear at a first hearing with a dozen witnesses in tow expecting to consume several hours of court time, unless he has checked with chambers and opposing counsel in advance. In most instances, if lengthy testimony is expected, the Court will use the initial hearing as a pretrial hearing and give the matter a special setting when sufficient time can be set aside. Counsel should not request a special setting merely for purposes of delay.

After monetary default, the next most frequently litigated factual issue is valuation of collateral. Counsel should freely exchange written appraisals and other documentary evidence as to value on an informal basis. If the dispute cannot be resolved by counsel, without the Court's assistance, at a minimum the presentation of evidence should be streamlined. Counsel should not present themselves in Court without first having made a reasonable attempt to resolve the matter informally. It is a waste of the Court's time if counsel use a hearing to introduce themselves to opposing counsel and explore settlement for the first time.

C. ORDERS

Most of these motions are resolved by counsel prior to being called for hearing. If so, the moving counsel should prepare an agreed order and forward it to the Court. The best way to do this now is by e-mail. The chambers e-mail addresses are as follows:

Judge Sawyer wrs@almb.uscourts.gov

Proposed orders should be sent in WordPerfect or Microsoft Word format. If Word is used, please do not use any version more advanced than Word 2000. The agreed order should contain a statement that all parties agree to its terms and should bear the name of the drafting attorney. (Eg. Prepared by John Doe, Attorney for the Debtors). Once an agreed order is sent to the chambers e-mail box, no further action is necessary. It is not necessary for counsel to appear at the hearing. If debtor's counsel is unable to offer a defense to a motion, it is expected that he will make moving counsel aware of this at the earliest practicable time.

If the motion is actually disputed, the Court will usually rule from the bench and ask the prevailing party to submit a proposed order. As in the case of agreed orders, they should be submitted to the Court by e-mail and should bear the name of the drafting attorney. These orders should also reference the date of the hearing. When drafting an order for the Court, counsel should not ask for relief which is different from that requested in the motion, unless it is specifically brought to the attention of opposing counsel and the Court at the hearing. Provisions waiving the 10 day stay of Rule 4001(a)(3) are not favored and will not be approved unless either (1) the moving party has submitted evidence supporting such a waiver, or (2) opposing counsel has consented expressly in writing or on the record to such a waiver. If the Court rules in favor of a moving party who has already filed a proof of claim, the order should provide that the claim is reduced to the amount paid. If counsel anticipates that an unsecured claim for a deficiency may be filed, he may provide for leave to file such a claim within a reasonable period of time.

IV. MOTIONS FILED PURSUANT TO 11 U.S.C. SECTION 522(f)(1)

After motions for relief from the automatic stay, the next most common motions filed in this court are motions to avoid judicial liens or nonpurchase security interests in personal property, which may be filed pursuant to 11 U.S.C. §§ 522(f)(1)(A) and (B) respectively. Several thousand of these motions are filed every year in this Court. The vast majority of these motions are "boiler plate," containing no specific factual representations. For many years, this Court has issued "boiler plate" orders which grant the motion "to the extent that the lien impairs an exemption to which the debtor is entitled." It is troubling that so much time and effort is wasted on motions and orders which do not do anything. In the future, motions filed pursuant to 11 U.S.C. § 522(f)(1)(A) or (B) must contain specific factual allegations so that orders entered will have some meaning. Motions filed with the Court should "state with particularity the grounds therefore, and shall set forth the relief or order sought." FED. R. BANKR. P. 9013. In an effort to implement this rule, the Court may deny motions which do not state particular grounds for relief.

While there is no cookbook approach that will fit every situation, these motions should contain the following:

1. A precise description of the instrument or judgement which created the lien. For motions filed pursuant to Section 522(f)(1)(A), the particulars of the judgment should be set forth, including: the caption of the case; date and amount of judgment; and the book and page reference for the recording of the certificate of judgment. For motions filed pursuant to Section 522(f)(1)(B), counsel should

provide the date of the instrument and a verbatim quote of the language in the instrument which creates the security interest. A copy of the instrument should be available for inspection upon request.

2. A statement as to the amount of the indebtedness.

3. A precise description of the property which is encumbered by the lien of the security interest and a statement as to its value. Counsel may not incorporate by reference information on the Schedules.

4. A calculation showing how the debtor's exemption is in fact impaired. Such a calculation would necessarily include an estimate of the value of each item of property, a description of any senior liens or mortgages upon the property and a reconciliation with the debtor's claim of exemption.

For example, under Alabama law a debtor has a $3,000 "wild card" personal property exemption. See ALA. CODE § 6-10-6. To the extent that a nonpurchase money security interest encumbers property which is not subject to the exemption, it may not be avoided. A properly pleaded motion must provide sufficient information to demonstrate that the debtor is entitled to the avoidance of a lien.

In the case of a motion to avoid a judicial lien, the motion shall set forth the extent to which the lien is avoided and the extent to which the lien remains. For example: assume that a debtor owns real property which constitutes his homestead. Assume further that the property has a value of $100,000 and is subject to a mortgage with a balance, as of the date of the petition, of $50,000. Assume further that the debtor has claimed his homestead exemption in the amount of $5,000, pursuant to Alabama Code Section 6-10-2. The judgment lien in question could be avoided to the extent of the $5,000 homestead exemption, but would remain affixed to the $45,000 equity in the property. A motion filed

under these circumstances must plead sufficient facts so that the Court may make a determination as to the extent to which the lien is avoided and the extent to which it is not.

V. MOTIONS TO DEFER ENTRY OF DISCHARGE

Motions to defer entry of discharge are governed by Bankruptcy Rule 4004(c)(2). These motions are usually filed by debtors' counsel to prevent entry of discharge before reaffirmation agreements can be filed. If these motions were filed on an infrequent basis, they would pose no problem to the Court. However, the sheer number of these motions has increased dramatically in recent months. Usually, these motions allege in only very general terms that additional time is needed to secure a reaffirmation agreement.

I am concerned that some lawyers may be filing these motions on a routine basis without any particularized need. These motions should not be filed unless counsel has made a diligent attempt to secure a reaffirmation agreement on a timely basis. From the date a petition in bankruptcy is filed to the running of the bar date is usually more than 90 days. If debtors' counsel were to solicit promptly all necessary reaffirmation agreements at, or shortly after the time the petition is filed, with prompt follow up correspondence as needed, it should be a relatively rare occurrence that a deferral of entry of discharge would have to be sought. The Administrative Office of the United States Courts has prescribed a form for reaffirmation agreements and a copy of that form is available on our website. Debtors' lawyers should promptly solicit reaffirmation agreements upon the filing of a new Chapter 7 Petition and should promptly follow up if a timely response is not received from the creditor. I would

ask that debtors' lawyers do their best to solicit reaffirmation agreements on a timely basis so that the number of these motions will decrease.

VI. MOTIONS RELATING TO INCOME WITHHOLDING ORDERS

It is the practice of this Court to issue income withholding orders in Chapter 13 cases wherever practicable. See 11 U.S.C. § 1325(c). In some cases this is not possible because the payor is one who cannot be compelled to withhold. The most common examples are Social Security Disability Income and Unemployment Compensation. In a similar vein, it makes no sense to issue a wage withholding order when the Debtor is self-employed. In these cases, the Chapter 13 Trustee does not issue income withholding orders. Please do not file motions seeking court orders to prevent the Chapter 13 Trustee from doing something that he cannot do anyway.

In a similar vein, some lawyers file motions for immediate income withholding orders, apparently fearing that their clients will otherwise default on their Plan payments, resulting in dismissal of the case prior to confirmation of the plan. Therefore, it may be necessary for Chapter 13 Debtors to make their first several months' payments voluntarily by sending a money order or cashier's check. Counsel who represent debtors in cases under Chapter 13 should remind debtors to write their case number on the money order. In the future these motions will be denied without further notice or hearing. However, counsel may write the Chapter 13 Trustee and request that an immediate wage withholding order be issued.

At the other end of the spectrum, some Debtors prefer to pay the Trustee directly rather than have the plan payments withheld from their wages. The Court generally discourages that practice due to the high rate of default in payments. Counsel should not file such motions in the future unless they can articulate a good reason. The fact that the Debtor prefers to pay directly is not sufficient. If counsel is of the view that such a motion is appropriate, the facts supporting the motion should be pleaded with specificity. The Court will consider these motions, usually without a hearing, and grant only those which allege facts which are unique to the Debtor. Motions which fail to meet this threshold may be denied without further notice or hearing.

VII. MOTIONS TO EXCUSE CHAPTER 13 PLAN PAYMENTS

In recent months I have noticed an increase in the number of motions to excuse Chapter 13 Plan payments. Neither the Bankruptcy Code nor the Rules provide for such motions. Usually they are filed when a debtor has had some kind of problem which precludes her from making scheduled plan payments. Loss of employment, injury, illness and pregnancy are the most frequent causes for the filing of these motions. I would suggest that counsel faced with a problem such as this select one of the following two options. First, if the debtor knows that the duration of the problem is limited and if the plan will still be feasible even if the payments in question are not made, simply write to the Chapter 13 Trustee and make him aware of the debtor's problem. If he accepts the suggestion, nothing more need be done. On the other hand, if he files a motion to dismiss for failure to make required plan payments, counsel may raise any reasonable grounds in opposition to the Trustee's motion. Second, if the plan

will no longer feasible if the contemplated payments are not made, then counsel should move to amend the plan, provided that the amended plan otherwise meets the requirements of the Bankruptcy Code. In the future, motions to excuse payments will be subject to denial without further notice or hearing.

VIII. MOTIONS TO RECONSIDER

The Court's primary function is to decide correctly the questions presented to it. When the Court errs, counsel should not hesitate to bring the matter to the Court's attention. If the order in question is a final order, the proper vehicle is usually motion to alter or amend pursuant to Rule 9023. If the order is not a final order, a motion to reconsider should be filed. When such a motion is filed, counsel should describe precisely the error and state the proper disposition, with citations to the Bankruptcy Code, reported case law or the record, as appropriate to the circumstances.

Counsel should not move to reconsider merely to repeat an argument which has already been made and rejected. Worse yet, counsel should not move for reconsideration because she was not prepared at the original hearing. In the most egregious cases, counsel will intentionally default on a motion only to make a weak argument which would have been rejected had it been made in the first instance, all in an effort to "buy time" for a client whose case is beyond hope. The Court takes all motions for reconsideration seriously as it does not want to rule against a party with a meritorious position. Counsel should use good judgment and not file these motions unless they have a good faith basis.

IX. EMERGENCY MOTIONS

The Court endeavors to hear and determine all motions promptly so that meaningful relief may be granted. Under our new electronic case filing system, we have not yet found a way to identify quickly emergency motions. Until we have found a solution to this problem, counsel with an emergency motion should telephone chambers to make the Court aware of the filing. Moving counsel should, if practicable, contact opposing counsel and determine whether it will be necessary to present evidence and if so how much time they expect to take. If the motion is to be decided on stipulated facts, with counsel making legal arguments, then the matter will probably be set for a telephonic hearing. As officers of the court, counsel are expected to use good judgment and ask for emergency hearings only if there is a true emergency. It is a poor practice to deem a motion an emergency merely to grandstand for the client or for the convenience of moving counsel.

X. SERVICE OF PROCESS

The filing of a motion or an objection initiates a contested matter. FED. R. BANKR. P. 9014. Such motions must be served in accordance with Rule 7004, and such other rules as may be applicable. It is my experience that the rules on service of process are honored most often in the breach. I have posted on our web site a monograph written by the Honorable James E. Massey, Bankruptcy Judge for the Northern District of Georgia, entitled "Service of Pleadings in Bankruptcy Cases" dated March 9, 2000. While those parts of the monograph dealing with the local rules in the

Northern District of Georgia or references to Georgia law are inapplicable here, I think practitioners will find this a valuable resource.

As Judge Massey discusses in his monograph, counsel frequently serve corporations improperly. The most common mistake is that counsel simply pick up an address from the mailing matrix or the schedules. Service in this manner would, in most cases, not comply with Rule 7004(b)(3), as an officer of the corporation must be served. The Alabama Secretary of State has an invaluable resource online. See www.sos.state.al.us. There, counsel may obtain information from annual reports, such as the names and addresses of officers, directors and registered agents for service of process. I urge counsel to review Rule 7004 periodically to ensure that they are properly serving motions, objections and adversary proceedings.

XI. CONCLUSION

To summarize this memorandum I would like to make three points. First, counsel should make sure that they are familiar with the Bankruptcy Code and Rules. Counsel should not file motions seeking leave to do that which the law permits them to without leave of court. Second, when it is appropriate to file a motion, counsel should state with particularity the legal and factual grounds upon which their motion rests and set forth succinctly the relief sought. Counsel should not file generic, "boiler plate" motions which are so general and conclusory in nature that they are essentially meaningless. Third, when there is an actual controversy, counsel should communicate in good faith,

exchanging documents and information and endeavor to settle disputes where possible. Failing to reach a settlement, counsel should eliminate extraneous issues and streamline the presentation of evidence.

This discussion is intended to raise the level of practice in this Court. If the suggestions made in this memorandum are incorporated, I believe that practitioners will find that they are spending less time and effort in each case and that they can better serve each clients' unique needs. The Court will benefit in that it can concentrate its time on those matters which are truly in dispute and which require its attention. Your cooperation is appreciated.